FILED
APR 8 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1523

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LAWRENCE V. ROBERTSON, JR.
Vice President, General Counsel and Secretary

Interstate Natural Gas Association of America
1660 L Street, N.W.
Washington, D.C. 20036

April 8, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

STATEMENT OF INGAA's INTEREST 2

ARGUMENT 3

I. Resolution Of The Question Presented Will Have An Industry-Wide Impact On Gas Pipelines' Ability To Develop Supplemental Gas Supplies 3

II. This Case Presents Important Questions Of Confiscation And Discriminatory Administration Of Regulatory Statutes 4

CONCLUSION 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1523

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 42 of the Rules of this Court, the Interstate Natural Gas Association of America (INGAA) hereby files it brief, as *Amicus Curiae,* in support of the Petition for Writ of Certiorari of Transcontinental Gas Pipe Line Corporation (Transco) to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit reported in *Tennessee Gas Pipeline Company, et al.* v. *F.E.R.C.*, 606 F.2d 1094 (D.C. Cir. 1979).

INGAA has received the parties' consent to file the instant brief and has filed with the Clerk of the Court letters so indicating.

STATEMENT OF INGAA'S INTEREST

INGAA is a nonprofit, national trade association representing virtually all of the major natural gas transmission companies operating in interstate commerce in the United States. Insofar as pertinent hereto, INGAA's member companies, which account for approximately ninety percent of all natural gas transported and sold in interstate commerce, are subject to the jurisdiction of the Federal Energy Regulatory Commission (Commission) under the Natural Gas Act, 15 U.S.C. § 717 *et seq.* In this brief in support of the granting of a writ of certiorari, INGAA wishes to emphasize certain points of special concern to the natural gas pipeline industry as a whole.

Commencing in the early 1970's, nearly all of INGAA's member pipelines were forced to curtail deliveries to their customers because of the pervasive shortage of natural gas available to interstate pipelines. In efforts to offset these curtailments of service, many of INGAA's member pipelines have actively pursued the development of supplemental, nonconventional sources of gas supply, *i.e.*, sources other than domestically produced natural gas. Projects of this nature require substantial sums of money, and the ability of pipelines to undertake such financing must not be impaired or precluded by unnecessary or improper obstacles. The decision of the Commission, as affirmed by the court of appeals, represents such an obstacle because of the serious adverse impact it may have on the ability of pipelines to successfully undertake development of needed supplemental gas supply projects. As a consequence, INGAA's members have a substantial interest in this Court's disposition of Transco's Petition for Writ of Certiorari.

ARGUMENT

I. Resolution Of The Question Presented Will Have An Industry-Wide Impact On Gas Pipelines' Ability To Develop Supplemental Gas Supplies.

The specific issue presented by this case is whether Transco will be allowed to recover from its customers its prudent expenditures in several supplemental gas supply projects which were designed to supply gas to those customers, but became unsuccessful and were abandoned. The court of appeals affirmed the Commission's denial of Transco's cost recovery based on its conclusion that "for rate base inclusion expenditures must satisfy not only the necessary condition of prudent investment *but also* must be 'used and useful' in providing service." 606 F.2d 1094 at 1123 (emphasis added). If this dual test for cost recovery is permitted to stand, the decision will have ramifications for the gas industry far beyond the confines of this case because such a test presents a serious impediment, if not an outright barrier, to a pipeline's ability to obtain the venture capital necessary for a high risk supplemental gas supply project. INGAA submits that this result is contrary to the nation's interest in and policy of encouraging the timely development of diverse supplemental energy sources.

The nation is highly dependent upon natural gas as part of its overall energy needs. Since the late 1960's, however, the nation has been consuming known gas reserves at a rate substantially in excess of the rate at which new gas reserves have been found. As a result, it has been necessary for the gas pipeline industry to turn to the development of synthetic gas and other non-

conventional sources in order to enable it to maintain its critical role as a major source of supply of the nation's energy requirements. The development of commercial-scale synthetic gas manufacturing processes is one promising means of fulfilling this role. However, these projects are expensive and high-risk propositions which will require favorable and proper regulatory treatment if the necessary venture capital is to be forthcoming. That some of these attempts will be unsuccessful is inevitable. As previously noted, however, the consequence of the Commission's decision as endorsed by the court of appeals will be to inhibit, if not preclude, access to the venture capital necessary for such projects. Moreover, it is completely at odds with the current efforts of the Congress and the President to mobilize this nation's resources on an unprecedented scale for the development of alternate sources of domestic energy supply.

II. This Case Presents Important Questions Of Confiscation And Discriminatory Administration Of Regulatory Statutes.

In addition to the adverse impact that the decision below will have on gas pipelines' efforts to develop alternative gas supply sources, this case presents the important question of whether the Commission has authority to disallow the recovery of legitimate expenditures by natural gas pipelines of the nature in question herein, while at the same time, and under effectively an identical statute, it routinely allows electric utilities subject to its jurisdiction to recover their costs of failed and abandoned projects. INGAA submits that disallowance of the recovery of such legitimate expenditures by gas pipelines, absent a finding of imprudence, is unconstitutionally confiscatory.[1] Furthermore, such inconsistency in rate making treatment by the Commission unfairly discriminates in favor of electric utilities which properly are allowed to recover their costs of failed and abandoned projects.[2] Since gas pipelines and electric utilities are both involved in supplying the energy needs of this country, the Commission's improper action in this regard will have the unwitting effect of favoring one source of energy over another. Moreover, since natural gas in the more efficient and environmentally preferred source of energy, the competitive advantages which the Commission's inconsistent ratemaking treatment will bestow upon electric utilities, whose new projects consist largely of proposed nuclear units or coal-fired generating units, is questionable at best.

Given (i) the current and projected energy requirements of the nation, and (ii) the conflicting precedents issuing from the Commission in contemporaneous cases involving ratemaking treatment for unsuccessful or abandoned gas and electric projects, it is extremely important that this Court provide benchmarks defining the constitutional limits of the Commission's authority under comparable statutory schemes with

---

[1] *See West Ohio Gas Co.* v. *Public Util. Comm'n*, 294 U.S. 63 (1935).

[2] Subsequent to the Commission's decision in the instant case, it has issued three electric rate opinions which permitted the recovery of costs of power supply projects that were ultimately abandoned. *See Southern California Edison Co.* (Opinion No. 62), —— FERC ——, [1979] 18 FED. POWER SERV. 5-980; *New England Power Co.* (Opinion No. 49), —— FERC ——, [1979] 18 FED. POWER SERV. 5-484; and *Southern California Edison Co.* (Opinion No. 821), —— FPC ——, [1977] 13 FED. POWER SERV. 5-163.

respect to appropriate ratemaking treatment for prudent utility expenditures. As circumstances now stand, and as the Commission's inconsistent decisions reflect, cost recovery for unsuccessful projects by utilities subject to the Commission's jurisdiction turns not on whether the project becomes "used and useful" but, rather, simply upon whether the affected company is a gas or electric utility. Such a result cannot be allowed to stand on either lawful or equitable grounds.

CONCLUSION

Because of the importance of the questions presented, INGAA respectfully submits that this Court should grant the writ of certiorari.

Respectfully submitted,

LAWRENCE V. ROBERTSON, JR.
Vice President, General Counsel and Secretary

Interstate Natural Gas Association of America
1660 L Street, N.W.
Washington, D.C. 20036

April 8, 1980